

Jan 18, 2024

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

1 JEFFREY WOOD,

2 Plaintiff,

3 v.

4 THE CINCINNATI SPECIALTY
5 UNDERWRITERS INSURANCE
6 COMPANY, an Ohio corporation,

7 Defendant.

No. 2:23-CV-00099-ACE

ORDER DENYING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT**ECF No. 18****BEFORE THE COURT** is Defendant's motion for summary judgment.

ECF No. 18. Defendant is represented by Sarah E. Davenport. Plaintiff is represented by attorneys Casey M. Bruner and Michael B. Love. Having reviewed the pleadings and the file, the Court is fully informed and herein denies Defendant's motion for summary judgment.

BACKGROUND

As stated in Plaintiff's complaint, quoting the state courts, "[t]his case is about a 'dream house turned into a nightmare.'" ECF No. 1 at 3 (quoting *Wood v. Milionis Constr., Inc.*, 198 Wash.2d 105, 110 (2021) quoting dissent in *Wood v. Milionis Constr., Inc.*, 2020 WL 2042964 (Wash.Ct.App. 2020) (unpublished) (Fearing, J., dissenting)).

In July 2015, Plaintiff and Milionis Construction entered into a contract for the construction of a single-family home in Newman Lake, Washington. Following several issues, construction ceased in November 2016 with the home unfinished, and Plaintiff filed suit against Milionis Construction in the Spokane County Superior Court. Defendant, the commercial general liability insurer for Milionis Construction, agreed to defend Milionis Construction under a reservation

ORDER - 1

1 of rights, including the right to deny coverage. On September 29, 2017, Defendant
2 filed an action in federal court (2:17-CV-00341-SMJ) seeking declaratory
3 judgment that it was not obligated to provide insurance or coverage of the claims
4 brought by Plaintiff against Milionis Construction. In response to the declaratory
5 suit, Milionis Construction filed counterclaims for insurance bad faith, violations
6 of the Insurance Fair Conduct Act, and violations of Washington's Consumer
7 Protection Act ("CPA"), Wash Rev. Code § 19.86, *et seq.* The federal court held
8 that Defendant had a duty to defend Milionis Construction and ultimately
9 determined that Milionis Construction's insurance bad faith and CPA claims
10 remained viable.

11 With respect to the state court litigation, Milionis Construction and Plaintiff
12 eventually entered into a settlement agreement. As a part of the settlement
13 agreement, Milionis Construction assigned to Plaintiff all claims it had against
14 Defendant. In this case, Plaintiff asserts the remaining assigned claims: insurance
15 bad faith and violation of the CPA.

16 On November 1, 2023, Defendant filed a motion for summary judgment.
17 ECF No. 18. Defendant argues Plaintiff's claims of insurance bad faith and
18 violations of the CPA should be dismissed because there is no evidence
19 Defendant's conduct was "unreasonable, frivolous, or untenable" or "unfair or
20 deceptive" and caused damages to Milionis Construction. ECF No. 18 at 2-3.
21 Plaintiff filed a response to the summary judgment motion arguing there is
22 sufficient evidence in the record to support a jury finding that Defendant's conduct
23 regarding its duties to Milionis Construction was in bad faith. ECF No. 21.

24 **LEGAL STANDARD**

25 Federal Rule of Civil Procedure 56(a) states that a party is entitled to
26 summary judgment in its favor if "the movant shows that there is no genuine issue
27 as to any material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). A
28 fact is "material" if it might affect the outcome of the suit under the governing law.

See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-249 (1986). A dispute is “genuine” as to a material fact if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *Id.* at 248.

Once the moving party has carried the burden under Rule 56, the party opposing the motion must do more than simply show there is “some metaphysical doubt” as to the material facts. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The party opposing the motion must present facts in evidentiary form and cannot rest merely on the pleadings. *Anderson*, 477 U.S. at 248. Genuine issues are not raised by mere conclusory or speculative allegations. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888 (1990).

The Supreme Court has ruled that Federal Rule of Civil Procedure 56(c) requires entry of summary judgment “against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Celotex*, 477 U.S. at 322. “A complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial.” *Id.* at 323. Therefore, the question on summary judgment is “whether the evidence is so one-sided that one party must prevail as a matter of law.” *Anderson*, 477 U.S. at 251-252. Where there is no evidence on which a jury could reasonably find for the nonmoving party, summary judgment is appropriate. *Id.* at 252.

DISCUSSION

As stated above, the Complaint asserts the remaining claims assigned to Plaintiff by Milionis Construction: insurance bad faith and violation of the CPA, *see* ECF No. 1 at 8-9, and Defendant's motion for summary judgment seeks dismissal of these claims, ECF No. 18. Plaintiff's response argues Defendant's motion for summary judgment should be denied because Defendant already brought this motion before Judge Mendoza and lost. ECF No. 21 at 1-2 (citing 2:17-CV-00341-SMJ; ECF No. 123).

1 Plaintiff is correct that the issues before the undersigned in Defendant's
2 motion for summary judgment have been previously addressed in this district by
3 the Honorable Salvador Mendoza, Jr. Here, the Court relies greatly on Judge
4 Mendoza's findings and conclusions as no known significant change has occurred
5 in the interim.

6 **A. Expert Disclosure**

7 Defendant's briefing initially points out that the Court's deadline for expert
8 witness disclosures, September 22, 2023, has passed without Plaintiff disclosing an
9 expert. ECF No. 18 at 7. Defendant argues that without an expert, Plaintiff has no
10 basis to establish that Defendant could have acted in bad faith or in violation of the
11 CPA. *Id.* at 11, 15.

12 Plaintiff responds that, consistent with the parties' joint statement, ECF No.
13 11 at 2-3, and representations made at the telephonic scheduling conference, the
14 parties agreed to rely upon the discovery propounded in the prior federal case.
15 ECF No. 21 at 3. That is the Court's recollection as well.

16 Although Plaintiff did not re-disclose their expert as directed by the Court's
17 scheduling order, ECF No. 14 at 3, given the likelihood of confusion regarding
18 discovery,¹ the Court would permit the parties to rely on their prior discovery to
19 satisfy the Court's scheduling order or, in the alternative, the Court would entertain
20 a motion for a continuance of the deadlines provided in the initial scheduling order,
21 both expired and unexpired.

22 Plaintiff's response requests that Defendant be sanctioned for making false
23 representations regarding this issue. ECF No. 21 at 3. The Court believes
24 confusion regarding discovery obligations is the culprit and that Defendant did not
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26 ¹As noted by Plaintiff, Defendant's motion relies on an expert report that it
27 also failed to re-disclose in compliance with the Court's scheduling order. ECF
28 No. 21 at 3.

1 make knowing, false statements. Therefore, the Court is not inclined to impose
 2 sanctions at this time.

3 **B. Bad Faith Claim**

4 As stated in Judge Mendoza's prior order regarding insurance bad faith
 5 claims, an insurer in Washington has a duty of good faith to its policyholder and
 6 violating that duty may give rise to a tort action. *Smith v. Safeco Ins. Co.*, 150
 7 Wash.2d 478, 484 (2003). To establish a breach of the common law duty of good
 8 faith, a plaintiff must prove a defendant's action "was unreasonable, frivolous, or
 9 unfounded." *Mut. of Enumclaw Ins. Co. v. Dan Paulson Constr., Inc.*, 161
 10 Wash.2d. 903, 916 (2007). Reasonableness is assessed in light of all the facts and
 11 circumstances of the case. *Anderson v. State Farm Mut. Ins. Co.*, 101 Wash.App.
 12 323, 329-330 (2000). Moreover, because Defendant defended Milionis
 13 Construction in the underlying action under a reservation of rights, Defendant had
 14 an "enhanced obligation" of fairness as part of its duty of good faith. *Tank v. State*
 15 *Farm Fire & Cas. Co.*, 105 Wash.2d 381, 387 (1986).

16 This enhanced obligation is fulfilled by meeting specific criteria. First, the
 17 company must thoroughly investigate the cause of the insured's accident and
 18 the nature and severity of the plaintiff's injuries. Second, it must retain
 19 competent defense counsel for the insured. Both retained defense counsel
 20 and the insurer must understand that only the insured is the client. Third, the
 21 company has the responsibility for fully informing the insured not only of
 22 the reservation-of-rights defense itself, but of all developments relevant to
 23 his policy coverage and the progress of his lawsuit. Information regarding
 24 progress of the lawsuit includes disclosure of all settlement offers made by
 25 the company. Finally, an insurance company must refrain from engaging in
 26 any action which would demonstrate a greater concern for the insurer's
 27 monetary interest than for the insured's financial risk.

28 *Id.* at 388.

29 As noted by Judge Mendoza, although the record reflects Defendant
 30 continued to engage in the mediation proceedings, raised the amount it offered to
 31 contribute toward settlement, was not obliged to accept the settlement amount

1 demanded, and ultimately split the file between a liability representative and a
 2 coverage counsel when a bad faith claim was asserted, Plaintiff has propounded an
 3 expert that opined Defendant acted improperly in handling the claim by failing to
 4 timely split the file, allowing direct communications between the representative
 5 and counsel, and failing to consider the recommendations or analyses of counsel
 6 prior to the mediation conferences. *See* 2:17-CV-00341-SMJ; ECF No. 123 at 6-7.
 7 Plaintiff's expert noted Defendant was focused at the outset only on its "no
 8 coverage" position and did not consider its "enhanced" duty of good faith to
 9 Milionis Construction. *Id.*

10 As previously determined by Judge Mendoza, Defendant is not entitled to
 11 summary judgment on the bad faith claim because there are disputed material facts
 12 pertaining to the reasonableness of Defendant's conduct. The Court finds that a
 13 reasonable jury could conclude that Defendant acted in bad faith; therefore,
 14 Defendant's motion for summary judgment on the insurance bad faith claim is
 15 denied.

16 C. Consumer Protection Act Claim

17 The CPA prohibits unfair or deceptive acts or practices in the conduct of
 18 trade or commerce. Wash. Rev. Code § 19.86.020. A prima facie CPA claim
 19 requires a plaintiff to show: (1) an unfair or deceptive act or practice; (2) occurring
 20 in trade or commerce; (3) impacting the public interest; (4) an injury to the
 21 business or property; (5) that is proximately caused by the unfair or deceptive act
 22 or practice. *Hangman Ridge Training Stables v. Safeco Title Ins. Co.*, 105
 23 Wash.2d 778, 784-785 (1986). "[A]n insurer's breach of its duty of good faith,
 24 [Revised Code of Washington §] 48.01.030, constitutes a per se violation" of the
 25 CPA. *Gingrich v. Unigard Sec. Ins. Co.*, 57 Wash. App. 424, 433 (1990) (citing
 26 *Salois v. Mut. of Omaha Ins. Co.*, 90 Wash. 2d 355, 359 (1978)).

27 On reconsideration, Judge Mendoza decided that because the CPA claim
 28 was closely related to the bad faith claim, the CPA claim premised on bad faith

1 would be allowed to proceed to trial. *See* 2:17-CV-00341-SMJ; ECF No. 149 at 4-
2 5. The undersigned agrees.

3 Since an insurer's breach of its duty of good faith is a per se violation of the
4 CPA, and Defendant is not entitled to summary judgment on Plaintiff's insurance
5 bad faith claim, the CPA claim shall remain viable. Defendant's motion for
6 summary judgment on the CPA claim is denied.

7 **D. Damages**

8 Defendant's briefing argues that Plaintiff has failed to set forth sufficient
9 facts to support the necessary element of damages for the bad faith and CPA
10 claims. ECF No. 18 at 14; ECF No. 24.

11 As determined above, Plaintiff has presented sufficient facts to establish
12 *prima facie* insurance bad faith and CPA claims and survive summary judgment.
13 Plaintiff shall be permitted to prove damages at trial.

14 **CONCLUSION**

15 Based on the foregoing, **IT IS HEREBY ORDERED** Defendant's Motion
16 for Summary Judgment, **ECF No. 18**, is **DENIED**.

17 **IT IS SO ORDERED.** The District Court Executive is directed to file this
18 Order and provide copies to counsel.

19 DATED January 18, 2024.



20 
21 ALEXANDER C. EKSTROM

22 UNITED STATES MAGISTRATE JUDGE
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